Office-Supreme Court, U.S.
FILED
FEB 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-885

In the Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION,

Respondent.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MALLEABLE IRON RANGE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR MALLEABLE IRON RANGE COMPANY IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Malleable Iron Range Company, herein, does not agree with the Board's question presented for review; therefore, the following is submitted as a substitute should the Court decide to grant the Petition:

> "Whether the Court of Appeals for the Seventh Circuit erred by finding that the Board did not apply the proper legal standard of *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974), relating to a determination of eligibility of employees in a collective bargaining unit; namely, that all confidential employees, and not only those in labor relations, are excluded from the protection of the National Labor Relations Act."

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SUMMARY OF ARGUMENT

Review of the decision by the Court of Appeals for the Seventh Circuit is precluded by prior decision of the Supreme Court and the lack of any real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

ARGUMENT

In *NLRB* v. *Bell Aerospace*, 416 U.S. 267 (1974), this Court concluded "that Congress intended to exclude from the protection of the Act all employees properly classified as 'managerial'" (416 U.S. at p. 275), and not "just those in positions susceptible to conflicts of interest in labor relations". (416 U.S. at p. 274). This conclusion was guided by an examination of early Board decisions, the legislative history of the Act and subsequent Board and court decisions. (416 U.S. at p. 274). The legislative history was interpreted implicitly as excluding "confidential employees" from the protection of the Act where they "receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally." (416 U.S. at pp. 283-284).

The Court of Appeals below concluded that the Board did not apply the proper legal standard of *NLRB* v. *Bell Aerospace Co., supra,* in determining the bargaining unit eligibility of certain employees alleged by Respondent to be ineligible for at least the reason that the employees were confidential.[1]

[1] The Board correctly notes that Respondent's confidential employee ineligibility contention related to eighteen (18) employees. (Petition, pp. 11-12). However, the Court of Appeals did not address several other issues raised by Respondent; namely, (1) Whether thirteen (13) of the 18 and four (4) other employees should be managerial exclusions from the bargaining unit?; (2) Whether four (4) of the eighteen and another employee should be supervisory exclusions from the bargaining unit?; and, (3) Whether improper legal standards were applied by the Board in determining that time study and research-development engineers and plant clerical employees comprise an appropriate collective bargaining unit together with non-managerial-confidential office clerical employees?

In an Unpublished Order, the Court of Appeals applied the decision in *Hendricks County Rural Electric Membership Corp.* v. *NLRB*, 603 F. 2d 25 (CA-7, 1979), in which the Court ruled as follows:

> "The legislative history of the Taft-Hartley Act, as interpreted in *Bell Aerospace*, requires the conclusion that *all* secretaries working in a confidential capacity, without regard to labor relations, be excluded from the Act". (603 F. 2d at p. 30).

As a result, the Court of Appeals in the case below involving Respondent held that "all confidential employees, and not only those in labor relations, were excluded from the protection of the Act." (Petition, pp. 57a-58a). Consequently, the Court of Appeals remanded the proceedings to the Board"' * * * to permit the Board to apply the proper legal standard * * *.' *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 289 (1974)." (Petition, p. 59a).

The Court of Appeals has correctly interpreted and applied this Court's decision in the *Bell Aerospace* case.

Thus, the primary reason for denying the Petition is because the asserted issue for review has been foreclosed by the Supreme Court's decision in the *Bell Aerospace* case. Under this circumstance, the denial of a petition for a writ of certiorari is appropriate. *Burrell et al.* v. *McCray et al.*, 462 U.S. 471 (1976).

With regard to the Board's argument that the decision of the Court of Appeals below has "created a conflict among circuits concerning an important question of federal law that warrants review" (Petition, p. 13), it is well settled that certiorari is granted in this regard only "in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal". *NLRB* v. *Pittsburgh Steamship Co.*, 340 U.S. 498,

502 (1950); *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1954); and, *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1922). The cases relied on by the Board do not satisfy this discretionary standard. The Court in *Union Oil Co. of California, Inc.*, v. *NLRB*, 607 F. 2d 852 (CA-9, 1979) did not rule that the "labor nexus" test was an indispensable element for determining confidential status; therefore, the ruling of the Ninth Circuit, that substantial evidence on the record as a whole supported the Board's determination that certain computer operators were not confidential employees, is not an apparent interference with the application of *Bell Aerospace* by the Seventh Circuit. The same applies to *NLRB* v. *Allied Products Corp.*, 548 F. 2d 644 (CA-6, 1977). The *dictum* from the opinion of the Sixth Circuit quoted by the Board to support the "conflict" argument is merely a restatement of precedents predating *Bell Aerospace*. (Petition, p. 15; 548 F. 2d at p. 648). The Sixth Circuit reversed the Board's determination that two secretaries were not confidential by applying a more expansive exclusionary legal standard than that which makes the "labor nexus" test an essential element. Similarly, *NLRB* v. *Hoerner-Waldorf Corp.*, 525 F. 2d 805 (CA-8, 1975) does not represent "a real and embarrassing conflict of opinion and authority", because the case was disposed of by the Eighth Circuit solely on a supervisory exclusion question and the Court only summarily dealt with a contention relating to the confidential status of certain employees.

The Board's fundamental position in seeking review distills to a dissatisfaction with this Court's rejection of the "labor nexus" test. From this the Board argues that the Case should be reviewed because it involves a question of public importance. However, a claim by a party litigant that an adverse court decision will have profound

effects contrary to that party's interpretation of the law should not be a sufficient ground for granting a petition for a writ of certiorari.

Lastly, in view of this Court's decisions in *Bell Aerospace*, which involved a thorough review, analysis and interpretation of the legislative history of the Act, and *NLRB* v. *Yeshiva University*, 444 U.S. 672 (1980), any change to or reversal of the prevailing legal standard, which applies to the determination of managerial-confidential eligibility questions to the extent that the "labor nexus" test is not an indispensable element thereof, should be made by the legislative process and procedures.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted

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January, 1981